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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1204

STERLING KEITH ROGERS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

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For the Fifth Circuit

The Petitioner, STERLING KEITH ROGERS, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of appeals for the Fifth Circuit entered in this proceeding on November 27, 1974.

OPINION BELOW

The findings of fact and conclusions of law of the District Court for the Western District of Texas is not officially reported but appears in the appendix hereto. The opinion of the Court of Appeals is reported in 504 F.2d 1079 (5th Cir. 1974) and appears in the Appendix hereto. A copy of the Order denying the Petition for a

rehearing en banc, entered February 21, 1975 also appears in the Appendix. Pursuant to Rule 21(2) of the Supreme Court Rules, Petitioner is submitting the Appendix printed and filed with the Fifth Circuit. Hereinafter this Appendix will be referred to as the Record (R.).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 27, 1974. A Petition for a rehearing en banc was timely filed and an Order, denying the Petition for a rehearing en banc, was entered on February 21, 1975. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether and under what circumstances the Border Patrol may lawfully conduct roving stops and searches of automobiles, without warrant or probable cause in areas not far removed from an international boundary for the purpose of apprehending aliens illegally entering or in the country.

II.

Whether Petitioner's responses to interrogation are admissable when obtained after repeated understood *Miranda* warnings but after an earlier unrescinded refusal to waive *Miranda* rights.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

The following portion of the Fourth Amendment of the Constitution of the United States:

> "... the right of the people to be secure in their persons ... and effects against unlawful searches and seizures ... and no warrants shall issue but upon probable cause ..."

Immigration and Nationality Act of 1952, Section 287(a)(3), 8 U.S.C. Section 1357(a)(3):

> within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States ...

8 C.F.R. 287.1 Definitions.

> (a)(1) *External boundary.* The term "external boundary" as used in Section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt

of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons affecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT OF FACTS

This is a criminal prosecution against a defendant who was found near a large quantity of marijuana about a quarter of a mile from the international boundary between the United States and Mexico. He was charged with five separate offenses in an indictment alleging (1) conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C.. Section 846, (2) possession with intent to distribute in violation of 21 U.S.C., Section 841(a)(1), (3) using a communications facility in violation of 21 U.S.C., Section 843, (4) conspiracy to import marijuana in violation of 21 U.S.C. Section 903, and (5) importing marijuana in violation of 21 U.S.C., Section 952(a) and 960(a)(1). (R. 1-3) Trial by jury resulted in a finding of guilty on the first four counts and not guilty on the fifth.

The facts were that on October 7, 1973, at about 6:30 A.M. Border Patrolman Joe J. Thompson met an approaching camper vehicle on a dirt road that parallels the Rio Grande River about thirty miles south of El Paso, Texas. At this point the river is the international boundary between the United States and Mexico and the dirt road in question runs a quarter to a half of a mile to the northeast of it. Patrolman Thompson had left Fabens, Texas, a little after 6:00 A.M. on a routine patrol of the El Paso-Hudspeth County line for the specific purpose of arresting or apprehending aliens entering the United States illegally (R. 47-49).

Patrolman Thompson was traveling without his lights as was the vehicle. It was just getting light but the sun had not risen. Thompson made his decision to stop and search the vehicle as soon as he saw it ap-

proaching without lights (R. 21, 71) This decision was based on the patrolman's knowledge that illegal entrants were sometimes picked up by such vehicles in this area and upon his belief that he has the right to make a stop and search anywhere within twenty-five miles of the border. (R. 71)

He pulled to the side of the road and stopped. The camper began accelerating just before, or as it passed him. The patrolman gave chase and after several miles and two pistol shots by the officer, the camper pulled off the road, stopped near some farm houses, and a figure ran into a cotton patch. The patrolman and some civilians began searching and shortly the defendant was found lying face down between two rows of cotton about 100 feet from the camper. (R. 51-57)

> Thompson handcuffed Rogers and explained his *Miranda* rights to him. Rogers was noncommunicative. They walked back to the camper, where Thompson read *Miranda* warnings to Rogers from a card and then searched him. Rogers indicated that he understood his rights but that *he would not waive them.* (Emphasis supplied, Fifth Circuit opinion 504 F.2d at 1081, cf. R. 59).

Marijuana was found in the back of the camper and a walkie-talkie and a scanner were found in the cab.

This, then, was the entire case against the defendant until Special Agent Theodore J. Baden arrived on the scene about 8:30 that morning, took custody of Rogers and drove him to the Bridge of Americas Port of Entry in El Paso where he was interrogated. Agent Baden

then said he gave the defendant his rights again as they drove out of the area in Baden's car. (R. 93) He did not know the defendant did not want to waive his rights. Agent Baden testified that the defendant said he understood his rights. (R. 94) The agent did not ask him if he waived his rights and there is no showing in this record that he did. The defendant, throughout the interrogation, made clear to the agent he did not want to cooperate and finally the interrogation was terminated. (R. 99) In fact, Agent Baden testified that if he had known that the defendant had refused to waive his rights he would not have interrogated him. (R. 106)

The admissions alleged to have been made to Agent Baden in the car and at the Bridge of the Americas Port are as follows:

> Well, I *asked* him the normal questions, sir, about how old he was, where he was from, and than I *asked* him about the radios that had been found in the vehicle. He told me that the radios belonged to him and he had bought them at the Radio Shack in El Paso. And when I *asked* him regarding the scanning unit, the police scanner there, which frequencies he had on it he said he didn't know, that he had merely asked the man at the Radio Shack for the crystal for the police frequencies in the El Paso area. I *asked* him specifically if he had Customs frequency on there and he said he did not know. I *asked* him if he had the Border Patrol frequency on there and he said he did not know. He told me the price as well. I believe he said it was $150.00 that he paid for the scanning unit, and I also believe he told me he paid $150.00 for the

> transceiver unit. The transceiver is a walkie-talkie type of affair. And I *asked* him where the other one was. And he said to me they were in the area, but they got paranoid and split. I also *asked* him about the vehicle, the pick-up and camper that he had been driving. And he told me that the vehicle belonged to him, that he had driven it to the levy and that some unknown Mexicans had loaded it for him. (Emphasis supplied R. 102-103).

One further admission was testified to by Agent Compton:

> He said he wasn't supposed to have gotten any marijuana, he said he was stupid for picking it up. That he wasn't supposed to pick it up, but that he did. (R. 114)

These admissions in response to questions and after an unrescinded refusal to waive *Miranda* rights provided the sole evidentiary basis for three counts of the four count indictment which engendered a fifteen year sentence.

The defendant filed timely motions to suppress the use of marijuana as evidence against him (R. 4-5) and to suppress the use of his alleged admissions (R. 28-29). These motions were overruled and the court accordingly filed findings of fact and conclusions of law. (R. 40-43)

REASONS FOR GRANTING THE WRIT

(1) Whether And Under What Circumstances The Border Patrol May Lawfully Conduct Roving Searches On Automobiles, Without Warrant Or Probable Cause, In Areas Not Far Removed From An International Boundary For The Purpose Of Apprehending Aliens Illegally Entering Or In The Country.

A.

This Court's decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which was a case of first impression, has thrown considerable confusion into the lower courts in spite of the opinion's objective and articulable standard for delineating the Fourth Amendment protections from arbitrary police conduct which are applicable in the context of what is generically called the "border search." This Court has stated that if it is to be concluded that a search is a "border search," it must be conducted at the border or the functional equivalent of the border. It was Rogers' contention in the District Court and in the Court of Appeals that the stop of his vehicle by a roving patrol did not take place at an international boundary nor its functional equivalent; therefore, the standard of law which invalidates the Fourth Amendment was inapplicable, and probable cause should have been required for the roving patrol to stop Rogers.

At the outset it should be noted what specific points of law the case of Petitioner Rogers does not concern.

The stop of Rogers' automobile was by a roving patrol not unlike that proscribed in *Almeida-Sanchez*. This case does not concern the propriety of the fixed checkpoints which are now before the Court. *E.g.*, *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) *cert. granted* 43 U.S.L.W. 3208 (October 15, 1974). Neither does this case present the issue of the retroactive application of the principles enunciated in *Almeida-Sanchez*, because the stop and search of the Rogers vehicle took place after June 21, 1973, the date of this Court's decision in *Almeida-Sanchez*, and within the time which the Fifth and Ninth Circuits have determined *Almeida-Sanchez* applies. *See, e.g.*, *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974). But this is not to say that similar issues as to the propriety of stops at the functional equivalent of the border are not common to the fixed checkpoint and the roving patrol.

It hardly needs to be stated that to satisfy the Fourth Amendment a search and seizure must be based on probable cause and must be authorized by a warrant issued by a judicial officer. It is also well established that an authorized officer may stop and search an automobile on a public highway *without a warrant* because a moving automobile would disappear before a warrant could be obtained. This narrow exception to the warrant requirement was established in *Carroll v. United States*, 267 U.S. 132 (1925), the justification for the exception being the mobility of the automobile. But automobile or no automobile, the officer must have *probable cause* to believe the vehicle is carrying contraband; "automobile or no automobile, there must be *probable cause* for the search." *Almeida-Sanchez v.*

United States, 413 U.S. 266, 269 (1973). Nothing in the automobile justifies an intrusion upon personal privacy at the whim or fancy or unsupported hunch of a government agent.

A well-established exception to the probable cause requirement has been grafted upon the Fourth Amendment by the doctrine of border searches. This exception to the warrant *and* probable cause requirements is also attributable to the landmark case of *Carroll v. United States*, 267 U.S. 132, at 153-154:

> Having thus established that contraband goods concelaed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such a search may be made. It would be intolerable and unreasonable if a prohibition agent was authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travelers may so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.* But those lawfully within the country, entitled to use the public highways, have a *right to free passage* without interruption or search unless there is known to a competent official authorized to search, *probable cause* for believing that their

vehicles are carrying contraband or illegal merchandise . . ." (emphasis added)

Petitioner does not question that there is reason and probable cause to search all persons presenting themselves at an international port of entry as persons entitled to come in. The true border search, one incident to a border crossing at an international boundary, presents little constitutional objection because (1) the constitution has no extraterritorial effect, (2) the inherent right of sovereignty justifies the protection of territorial integrity against the unauthorized intrusion of persons or things, and (3) there is little arbitrariness because travelers are charged with the knowledge that they are to relinquish certain rights of privacy incident to travel beyond our national boundaries. This is not to say that the often extravagant right to search, sometimes culiminating in rectal and vaginal searches, which is accorded to authorized officers at an international boundary is not without criticism. These abrogations of indispensable freedoms should be very narrowly construed.

B.

The validity of the sweeping license to stop and search which is allowed at an international boundary is highly questionable within the territorial confines of the United States where the Constitution has full force and effect. Rhetorically the question presented by Petitioner is: "Where is the border?" The constitutional question presented is whether and under what circumstances may the Border Patrol conduct roving searches in areas not far removed from an in-

ternational boundary for the purpose of apprehending aliens illegally entering the country. Conflicting pronouncements emanate from the various Fifth Circuit panels; there is substantial conflict between the Fifth and Ninth Circuits as to the standard which will support the "border search." The vital question of national importance presented by *Rogers* is whether the Constitution is to apply to the residents of states contiguous to the border.

Rogers is distinguishable from many border cases in that there was no tip by an informer that the Petitioner's car was carrying contraband; neither was there present constant surveillance, or surveillance of any kind from an international boundary. Arresting Patrolman Thompson, upon seeing the Rogers vehicle, radioed the checkpoints at the international boundary to see if the Rogers vehicle had crossed the international boundary. Patrolman Thompson did not receive word from the port of entry, and he had nothing other than proximity to the international boundary to connect the vehicle with illegal activity. At the Preliminary Hearing, Patrolman Thompson testified:

Q. Is there anything that you observed about the vehicle during any of the time that you saw it that led you to believe or would lead you to believe that it had — that the vehicle had crossed into the country from the Republic of Mexico?

A. No, sir, there would be nothing as to see a vehicle in, say, well it's coming from Mexico, no I couldn't make that statement.

Q. What was it that aroused your inclination to follow this vehicle?

A. Well, sir, my past experience in working alien smuggling cases is that a vehicle similar to this type is used and they often times go to the river either in early morning hours or in late evening hours and make a pickup of people and it just so happened I was in the wrong place at the right time for the person involved. (R. 20)

Petitioner was traveling lawfully upon the highways well within the United States. The Border Patrol agent, upon seeing Petitioner's vehicle, and upon his unsupported hunch, decided to stop Petitioner's vehicle and thereby began a wild high speed chase. Other than geographic happenstance, there was nothing to indicate that Petitioner had even been in Mexico. Many residents in the area from Fabens, Texas, to El Paso, Texas, travel upon these same roads every day, without crossing into Mexico. Counsel for Petitioner stated in his argument before the Fifth Circuit, that he lives in a neighborhood that is closer to the international boundary than the area in which this search took place, and practices law a half-mile from the international boundary. Is this to say that counsel, or his clients, or the people in the area of El Paso, Texas, area of a class of individuals subject to indiscriminate searches at the suspicion of border patrol agents? It would be unreasonable and intolerable to say that the Fourth Amendment does not apply to these individuals because of their proximity to the border.

In one case the Fifth Circuit has stated:

> Proximity to the border is not good enough. Proximity to the border is not the only standard for determining whether a search is the functional equivalent of a search at the border. There must be substantial connection with an actual or suspected border crossing by the person or thing to be searched. In other words, the searching officers must know or have a reasonable suspicion that the very individual or thing to be searched has itself just crossed the border. Judicial notice or even proof of many illegal acts in the area in which the search takes place is not enough . . . The justification for the border search exception to the warrant requirements of the Fourth Amendment is not merely the searches near the border are very effective in discovering contraband and criminal activity. Such a justification would totally emasculate the Fourth Amendment, since we seem to be reaching a point in history in which the justification could apply to nearly every facet of our lives . . . As the courts in *Byrd* and *Almeida-Sanchez* have recognized, to call a search a border search because it occurred near the border would effectively wall off an entire section of the country from the warrant and probable cause requirements of the Fourth Amendment. This we cannot allow.

United States v. Lonabaugh, 494 F.2d 1257 (5th Cir. 1973) (Morgan, J.). This Court stated with precision when a search is justifiable with less than probable cause: (1) at the border, or (2) at its functional equivalent. 413 U.S. at 272. A search is not exempted from the warrant and probable cause requirements of

the Fourth Amendment *ipso facto* because it occurs within the 100 miles of the border defined as "reasonable distance" by 8 C.F.R. Section 287.1. nor the 25 miles required in 8 U.S.C. Section 1357(a)(3). To qualify a search must occur *at the border* or at the *functional equivalent of the border.*

The phrase "at the border" presents no ambiguities. This obviously refers to searches and seizures of persons or property as they are in the act of crossing an international boundary. The question of functional equivalent presents more complex issues, and generally the Circuit Courts have taken a case-by-case approach to this enigma. This Court provided only one clear example of a functional equivalent, e.g., the Mexico City to St. Louis airplane. This Court did, however, suggest that checkpoints at arteries leading from the border might satisfy the functional equivalent test. This vague terminology had led to a split among the Circuits in interpreting whether or not the criteria of a functional equivalent are met by checkpoints. In the same manner, the lack of precise standards for measuring the applicability of the border search has led to the fabrication of other standards, such as "nexus," in efforts to justify stops disclosing substantial quantitites of marijuana.

The case in which a person has actually effected a border crossing, or is detected to have made a border crossing, presents vastly different constitutional problems for the case in which there is no evidence whatsoever that the suspects have recently been in

another country. For example, the case in which a person is inspected at a border crossing, but a more thorough search is deferred until the person is well within the United States, presents little analytical problem. But the Circuit Courts are now saying that surveillance from a border crossing or an actual border crossing is not a *sine qua non* of a valid border search. Instead of the functional equivalent of or actual contact with an international boundary, the courts have begun to substitute a more amorphous concept, that of a nexus. *United States v. Speed*, 489 F.2d 478 (5th Cir. 1973), aff'd on rehearing en banc, 497 F.2d 546 (1974); *United States v. Diemler*, 498 F.2d 1070, 1072 (5th Cir. 1974) (per curiam) (Bell, Simpson, Morgan, J.J.):

> The government cannot fulfill its burden of demonstrating nexus with the border merely by showing that many violations occur in the vacinity of the search. As this Court held more than a year before Almeida-Sanchez, "proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements." United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972) *cert. denied*, 413, U.S. 919 (1973).

Prior to *Almeida-Sanchez* roving patrols which routinely stopped and searched persons, not upon probable cause or "founded" or "unreasonable" suspicion, but upon the subjective notions of the border patrol,

were a common occurrence in border areas. Counsel for Petitioner strenuously argued before the Fifth Circuit panel in this case that Rogers was not concerned only with Petitioner's Fourth Amendment rights; it is argued still that this case presents the question of the Fourth Amendment rights of all residents in border towns such as El Paso, Texas. Contrary to what the government would have the courts believe, these roving patrols are not limited to sparsely populated areas and little traveled roads. El Paso is no longer a sleepy border town — its suburbs constitute a major metropolitan area. As the present state of the law stands, it is impossible for residents of El Paso to leave the vicinity without passing through border patrol inspection checkpoints which the Tenth Circuit and the Fifth Circuit have sanctioned. At least these fixed checkpoints present less constitutional objection, because, as the Fifth Circuit has stated: "At permanent checkpoints, the commitment of time, money, personnel, and the administrative decision for location of the search are all presumably such as to *remove to a large extent the individual arbitrariness that might be available to roving agents.*" *United States v. Hart*, 506 F.2d 887, 895 (5th Cir. 1975) (Roney, J.) (emphasis added). Yet a different panel of this same court can reach a different conclusion as to the propriety of a roving patrol given the panel's particularized concept of *nexus* with the border. This is nowhere mentioned in *Almeida-Sanchez*. Roving alien patrols are no longer the rule.

The Fifth Circuit in its opinion in *Rogers* relied on a previous holding in *United States v. Steinkoenig*, 487 F.2d 225, 227 (5th Cir. 1973):

> It is true that the vehicle searched had not yet crossed a border, but this Circuit has decided that a border crossing is not the *sine qua non* of a valid border search. In United States v. Hill, 5th Cir. 1970, 430 F.2d 129, the court adopted the Second Circuit rule that ". . . when an individual has direct contact with a border area, or an individual's movements are reasonably related to the border area, that individual is a member of the class of persons that a customs officer may, if his suspicions are aroused, stop and search while the individual is still within the border area." 430 F.2d 129 at 131.

This passage, cited in *United States v. Rogers*, 504 F.2d 1082 (5th Cir. 1974) (Dyer, J.), ably demonstrates the conflicting decisions coming from, *inter alia*, the Fifth Circuit. This passage from a pre-*Almeida-Sanchez* case which relies on the Second Circuits pre-*Almeida-Sanchez* holding that a certain *class* of individuals, namely those in the "border areas," are subject to searches merely on the suspicions of customs officers, is completely at odds with this Court's holding in *Almeida-Sanchez* that a border search must be conducted at the border or its functional equivalent. It is somewhat of an anomoly that Dyer, J., could find *Almeida-Sanchez* "inapposite," yet sustain the search on "mere suspicion."

The confusion in the Fifth Circuit has led to decisions contrary to those of the Ninth Circuit. For

example. Petitioner asserts that his case is on all fours with *United States v. Martinez-Tapia*, 499 F.2d 1244 (9th Cir. 1974). Yet the *Rogers* decision is to the contrary. At least it can be said that the Ninth Circuit has had the judicial wisdom to anticipate the impact of its border search decisions and has accordingly granted en banc review. *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974) (en banc) *cert. granted*, 43 U.S.L.W. 3208 (October 15, 1974); *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (en banc) cert. granted 43 U.S.L.W. 3208 (October 15, 1974). But the applicability of the Fourth Amendment in the Fifth Circuit states contiguous to the border now depends on the weather and the panel before which a case is argued.

Finally, the most important point which Petitioner wishes to argue before this Court is that indiscriminate searches by roving patrols in the border areas have a particular impact on the rights of minorities, especially Mexican Americans. It is well-known to border area residents, although it is poorly documented, that border patrol subject Chicanos to the indignity of searches on the basis of color and ethnic and racial characteristics in their freewheeling attempts to control illegal migration from Mexico. It is of paramount importance that this Court determine whether individual's are to be searched only at the border to its functional equivalent, or indiscriminately anywhere along a deconstitutionalized zone 100 miles from the border, 25 miles from the border, or anywhere near the border so long as there is a "nex-

us." or if there is simply to be a "class" of individuals in this country with no Fourth Amendment.

The Fourth Amendment, as should be emphasized, applies to "people" not just citizens. The justification of a search for aliens which enter without inspection presents no more justification for abrogation of constitutional safeguards than any other valid law enforcement object; unless this court is to allow the xenophobic hysteria which fears an invasion from Mexico to strip millions of persons of their constitutional right to be secure from unreasonable searches and seizures by roving alien patrols.

(2) The Opinion Below Is Representative Of Conflict In Federal And State Courts Which Seriously Deteriorates Accepted Practice In The Administration Of Criminal Justice Concerning Police Interrogation.

The opinion below clearly finds that the Petitioner did in fact affirmatively refuse to waive Miranda rights upon being arrested. The court did not deign to give any weight to such refusal but emphasized the numerous warnings which the Petitioner received and acknowledged before his incriminating responses. The court held that a waiver was thus demonstrated when Petitioner, rather than exercising his rights of silence, responded to police questions.

This petition focuses on the proposition that once a defendant has affirmatively refused to waive his rights he may not thereafter be interrogated until he affirmatively rescinds that refusal or initiates in-

terrogation. This proposition is clearly indicated in the language of *Miranda v. Arizona*, 384 U.S. 436, (1966), but this language has nonetheless led to a serious conflict of opinion below:

> *Miranda says:*
>
> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S. at 473-4.

This is the standard of this court which is now being eroded by the decision below. The court below would avoid the above dictate by reasoning that the burden of the government was met by repeated subsequent warnings. However, *Miranda* does not say "there can be no questionings" (384 U.S. at 445) *unless* the defendant is further warned and declines to exercise his rights by responding to questions as ruled in the decision below. The effect of allowing repeated warnings to cure a refusal to waive constitutional right is an exception which would emasculate the rule and should

not be countenanced. Such an exception would allow Miranda safeguards to become that which was condemned in Miranda, i.e. "a preliminary ritual to existing methods of interrogation." 384 U.S. at 476.

Further, the language of *Miranda*, *supra*, precludes any such drawing of implied waiver.

> This court has always set high standards of proof for waiver of constitutional rights. (citing *Johnson v. Verbst* (1938) 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, 146 A.L.R. 357) . . . . A valid waiver will not be presumed simply from the silence of accused after warnings are given or from the fact that a confession was eventually obtained.

The issue in this case is clearly framed — can a defendant impliedly rescind an articulated refusal to waive Fifth Amendment rights simply by responding to interrogation after repeated warnings of his right to remain silent? In spite of the above language of *Miranda* the Fifth Circuit ruling allows such an implied recission of refusal to waive constitutional rights.

Many of the other federal circuit courts are in clear conflict with such a holding. In *United States v. Clark*, 499 F.2d 802 (4th Cir. 1974), the Fourth Circuit had a similar case in which the defendant was repeatedly reread his rights and finally made statements. The court did not look to whether the defendant "was coerced in traditional terms but whether appropriate measures were taken to safeguard his rights," 499 F.2d at 806 and reversed finding that:

> Evidence that an accused has previously asserted his rights to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounselled confession is voluntary. 499 F.2d at 807.

The Seventh Circuit opinion in *United States v. Jenkins*, 440 F.2d 577 (7th Cir. 1971), is to the same persuasive effect in saying:

> A heavy burden devolves upon the government to show that interrogation occurring after an accused declines to sign a waiver form resulted from a knowing and intelligent waiver, in some other form, of the accused *Miranda* rights. 440 F.2d at 576.

See also *United States v. Nielson*, (7th Cir. 1968) 392 F.2d 849.

The state courts also have demonstrated a conflict in the extreme on this issue. Some courts hold that *Miranda* does *not* bar resumption of interrogation at a future time, and hence the only question is whether there was a knowing, intelligent waiver by defendant, when the questioning was resumed, e.g. *State v. Bishop*, 158 S.E.2d 511 (S.Ct. North Carolina 1968). Other state courts oppose the view taken by the Fifth Circuit and hold that once a suspect has asserted his constitutional privilege to remain silent, the police can *never* resume questioning him i.e. there can *never* be a valid waiver unless it is the suspect who initiated the further conversations. See *People v. Fioritto*, 441 P.2d 625 (S.Ct. Calif. 1968) (en banc). This conflict of

decisions indicates confusion over the meaning and effect of *Miranda* and begs resolution for an orderly and just administration of criminal justice.

The opinion below also militates against presently accepted practices of police interrogation. In the American Law Institute Model Code of Pre-Arraignment Procedure, Section 140.8 (2)(d) under "Waivers" provides:

> (d) No waiver shall be sought from an arrested person at any time after he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning.

Even Officer Baden in the present facts admitted that, had he known of the previous refusal to waive, he would have honored the request for constitutional safeguards implicit in the refusal, and would have ceased questioning. (R. 106). Should appellate standards of safeguarding constitutional rights provide anything less?

This crucial constitutional question, in conflict amongst the Circuit and State Courts, should be settled. The criminal justice system should be told of the significance attaching to a citizen's insistence on Constitutional rights when initially questioned as to waiver of understood rights. If such an insistence on rights merits another set of warnings and another round of questioning, all need to know it. On the other hand, if *Miranda* and this court dictate that insistence on Constitutional protection insulates against fur-

ther questioning — with or without repetition of warnings — then the Petitioner should not be exempted from that constitutional protection.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MALCOLM McGREGOR
1011 North Mesa Street
El Paso, Texas 79902
Attorney for Petitioner

UNITED STATES of America, Plaintiff-Appellee,

v.

Sterling Keith ROGERS, Defendant-Appellant.

No. 74-1252.

United States Court of Appeals,
Fifth Circuit.

Nov. 27, 1974.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and AINSWORTH and DYER, Circuit Judges.

DYER, Circuit Judge:

Rogers appeals from his jury conviction for (1) conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C.A. § 846, (2) possession with intent to distribute in violation of 21 U.S.C.A. § 841(a)(1), (3) using a communication facility in violation of 21 U.S.C.A. § 843, and (4) conspiracy to import marijuana in violation of 21 U.S.C.A. § 903.[1] His arguable contentions on appeal are that there was an illegal search

1 Rogers was found not guilty of importing marijuana in violation of 21 U.S.C.A. §§ 952(a) and 960(a)(1).

and seizure; that admissions used against him at trial were taken in violation of *Miranda;* that it was error to deny his motion for acquittal on Counts 1, 3 and 4; that his requested instructions should have been granted; and finally that the sentence imposed was based upon impermissible standards. We are unpersuaded that Rogers' trial was infected by reversible error, but because his sentence may have been based upon improper considerations, we vacate it and remand for resentencing.

At six-thirty on a Sunday morning as dawn was breaking, border patrolman Thompson of the Immigration Service was driving his marked vehicle in a sparsely settled area on a gravel road parallel with and about 300 yards sfrom the Rio Grande River, which was then either dry or fordable. He observed a pickup truck with a shell camper approaching him without lights. Thompson pulled over and stopped on the side of the road because the camper was coming from a known river crossing. It was extremely unusual for such a vehicle to be in this vicinity at such an early time on Sunday morning. Thompson was also aware that similar vehicles were often used to smuggle aliens, who were picked up at the river in the early morning or late evening hours. As the camper came closer and the driver apparently realized that the parked auto was a patrol car (Thompson's vehicle had a light bar and red lights on top and "United States Border Patrol" lettering on the sides), the driver of the camper turned on his headlights and accelerated. As Thompson turned the patrol car around the camper left him at a high rate of speed trying to get away. Thompson turned on his headlights, red lights and

siren and pursued the camper at speeds over 100 miles per hour. After some distance the camper left the road. traversed a cotton . eld, broke through a barbed wire fence. continued on at a high rate of speed through another cotton field and then came out on a road again. During this rough ride large clear plastic sacks, believed to contain marijuana, bounced up in the back of the camper and were clearly visible to Thompson.

Having gained the narrow paved road Thompson made several attempts to pass the camper to stop it but each time the camper was caused to fishtail across the road to prevent Thompson from coming alongside. Finally Thompson discharged his firearm in the air and the camper immediately made an abrupt turn off the road. A second shot was fired and the camper stopped between two labor houses on a farm. Rogers hastily fled the vehicle and ran into a cotton field. He was apprehended laying face down between rows of cotton. Thompson handcuffed Rogers and explained his *Miranda* rights to him. Rogers was noncummunicative. They walked back to the camper, where Thompson read *Miranda* warnings to Rogers from a card and then searched him. Rogers indicated that he understood his rights but that he would not waive them.

A search of the camper disclosed a scanner hooked up to run off a plug in the cigarette lighter, a walkie-talkie, battery pack, an extra antenna, and 427 pounds of marijuana.

THE SEARCH AND SEIZURE

The thrust of Rogers' argument that the marijuana was the fruit of an illegal search is that the search was neither a border search nor its functional equivalent. Almeida-Sanchez v. United States, 1973, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596, and was made without a warrant, consent, or probable cause. We disagree. In United States v. Steinkoenig, 5 Cir. 1973, 487 F.2d 225, 227, we pointed out that:

> It is true that the vehicle searched had not crossed a border, but this Circuit has decided that a border crossing is not the *sine qua non* of a valid border search. In United States v. Hill, 5 Cir. 1970, 430 F.2d 129, the court adopted the Second Circuit rule that ". . . when an individual has direct contact with a border area, or an individual's movements are reasonably related to the border area, that individual is a member of the class of persons that a customs officer may, if his suspicions are aroused, stop and search while the individual is still within the border area. 430 F.2d 129 at 131."

The search does not lose its border status because Rogers refused to stop 300 yards from the Rio Grande and had to be pursued for some miles from the border. Here the search occurred immediately after Rogers' vehicle was brought to a stop after a wild chase that followed the border area contact. We entertain no doubt that these circumstances create a nexus with the border that is sufficient to make this a border search. This being so probable cause is not required. It suf-

fices if the customs agent entertained a reasonable suspicion. *Steinkoenig, supra*, 487 F.2d at 228. Without recanvassing in detail what transpired from the initial contact on a gravel road close to the river, in a desolate area, at dawn on a Sunday morning, through the case, to the capture, we conclude that the agent had reasonable suspicion to search the camper. As we observed in *Steinkoenig*, and in like circumstances in United States v. Henriquez, 5 Cir. 1973, 483 F.2d 65, cert. denied, sub nom. Buckholz v. United States, 414 U.S. 1095, 94 S.Ct. 728, 38 L.Ed.2d 553, *Almeida-Sanchez* is inapposite because of the strong nexus with the border and the agent's reasonable suspicion of wrongdoing in this case.

ROGERS' ADMISSION

When Special Agent Baden arrived upon the scene where the chase had concluded he instructed another agent to take the camper to the Drug Enforcement office. Rogers spontaneously remarked that the vehicle would not run because he had burned out the engine. Baden then told Rogers that he knew that agent Thompson had explained his rights to him but he nevertheless repeated them to Rogers. During the drive to El Paso, Rogers admitted that he had purchased the radio and had asked for police crystals for the area. Rogers also admitted that the other walkie-talkie was in the area but that "they must have gotten paranoid and split." During the conversation Rogers said he owned the camper and had driven it down to the levee where some Mexicans whom he did not know loaded it with marijuana. When Rogers was asked who else was involved with him he refused to say any more.

Later, at the Drug Enforcement office, when agent Compton weighed the marijuana and found that it totaled 427 pounds, Rogers was again warned of his rights and stated that he wasn't supposed to have gotten any marijuana, that he was stupid for picking it up, but that he did obtain it.

At trial, objection was made to these statements on the ground that Rogers had not knowingly and intelligently waived the constitutional rights of which he had been warned. The objections were overruled and the statements were admitted.

We find no merit in the contention that the voluntary waiver requirements of *Miranda* were not met. It is undisputed that before Rogers made the statements during the drive to El Paso, he had been given *Miranda* warnings on three separate occasions; twice by Patrolman Thompson, when he was first taken into custody in the cotton field and again after he had been taken back to the camper, and a third time by Agent Baden before he drove Rogers to El Paso. Before Rogers said anything at the Drug Enforcement office he was, for the fourth time, advised of his rights. It is also undisputed that Rogers acknowledged that he understood his rights.

In United States v. Montos, 5 Cir. 1970, 421 F.2d 215, 224, cert. denied, 397 U.S. 1022, 90 S.Ct. 1262, L.Ed.2d 532, we elaborated on the proper construction of *Miranda* in these circumstances:

> When a defendant warned of his rights makes statements without a lawyer present, the prosecu-

> tion may use these statements at trial only if it sustains its "heavy burden" of demonstrating that the defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." . . . All that the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them. *See* Carnley v. Cochran, 369 U.S. 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962).

With this guideline, we found in United States v. Guzman-Guzman, 5 Cir. 1974, 488 F.2d 965, that

> the Government met its "heavy burden" by producing three witnesses who testified that the defendant was twice advised of his rights and that he twice acknowledged that he understood them . . . As in *Montos*, the [four] sets of warnings, admittedly understood, "effectively advised [the defendant] of his rights and . . . he then intelligently and understandingly declined to exercise them," . . . In these circumstances, the admissionof such a statement constitutes no affront to *Miranda*.

Id. at 966.

MOTION FOR ACQUITTAL ON COUNTS 1, 3 and 4

We need not tarry long to dispose of Rogers' argument that there was insufficient evidence to establish his guilt of the offenses charged in Count 1, as conspiracy to possess marijuana with intent to distribute;

Count 3, the use of communications equipment to facilitate the importation of marijuana; and Count 4, a conspiracy to import marijuana. Rogers asserts that there was no extrinsic evidence to corroborate the corpus delecti, and, in any event, the statements were insufficient to prove a conspiracy.

It would be inutile to recapitulate the evidence we have recited *in extenso*. It is enough to say there was an abundance of evidence to corroborate Rogers' admissions and to establish their trustworthiness. Opper v. United States, 1954, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101; Hoover v. Beto, 5 Cir. 1972, 467 F.2d 516, cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673; United States v. Allen, 9 Cir. 1972, 455 F.2d 509. Taking the view most favorable to the Government, Glasser v. United States, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, on a motion for judgment of acquittal "the test is whether . . . a reasonably-minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Knox, 5 Cir. 1972, 458 F.2d 612, 615, cert. denied, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 85. Under this standard the trial court properly submitted the case to the jury on all counts.

DEFENDANT'S REQUESTED INSTRUCTIONS

Rogers' complaint that probable cause to conduct a search of his camper was a fact issue to be determined by the jury, and that it was error to deny his requested charge posing such an issue, is frivolous. Probable cause and reasonable suspicion are legal issues to be determined by the court for the purpose of admitting

or suppressing evidence. Obviously they are not issues to be determined by a jury at the conclusion of a trial for the purpose of sorting out evidence to determine what evidence was admissible.

Equally without merit is Rogers' contention that the district court erred in refusing to charge, as requested in connection with Count 2, that he could be found guilty of simple possession of marijuana, a lesser included offense of possession with intent to distribute. At the time of his arrest Rogers had in his possession 427 pounds of marijuana, worth somewhere between $30,000 and $60,000 on the street. The vast amount of marijuana here involved, the sale of which would have been enormously profitable, strongly supports an inference that Rogers did not intend to use it himself but intended to sell it. United States v. Nocerino, 2 Cir. 1973, 474 F.2d 933, cert. denied, 412 U.S. 942, 93 S.Ct. 2785, 37 L.Ed.2d 402; United States v. Ortiz, 10 Cir. 1971, 445 F.2d 1100, cert. denied, 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545; *see also* United States v. Fonseca, 5 Cir. 1974, 490 F.2d 464; United States v. Polite, 5 Cir. 1974, 489 F.2d 679. In any event the Court's refusal to instruct on simple possession was not error since "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser-included offense." Sansone v. United States, 1965, 380 U.S. 343, 350, 85 S.Ct. 1004, 1009, 13 L.Ed.2d 882. (emphasis supplied). Absent some evidence to counter the strong inference of intent to distribute, the issue is not elevated to a truly disputed one.

SENTENCING

The court made an express finding in the record that Rogers would not benefit from treatment under the Youth Correction Act, 18 U.S.C.A. § 5010(b) or (c),[2] and imposed an aggregate sentence of 15 years' imprisonment, followed by a 9 years' special parole term. At the time of sentence the court clearly indicated its distaste for Rogers' lack of cooperation in identifying his confederates, especially in the face of the jury's finding that a conspiracy existed. It gave Rogers to understand that the first step towards rehabilitation, in its opinion, was to cooperate with the authorities in bringing others involved in the conspiracy to justice, and unless and until Rogers indicated "substantial, material, productive cooperation" the court would not consider a lesser sentence.

Rogers urges us to review the sentences meted out since, although they are within the statutory limits, they are harsher than would have been otherwise imposed simply because he insisted upon his constitutional right to remain silent. We, of course, cannot modify the sentence, but if indeed Rogers "paid a judicially imposed penalty for exercising his constitutional guaranteed rights," we are called upon to exercise our supervisory powers. Thomas v. United States, 5 Cir. 1966; 368 F.2d 941, 946. As we recently explained in United States v. Hartford, 5 Cir. 1974, 489 F.2d 652, 654:

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2 Despite Rogers' contentions to the contrary, the district court's express finding satisfied the requirements of § 5010(d) of the Act. Dorszynski v. United States, 1974, ___ U.S. ___, 94 S.Ct. 3042, 41 L.Ed.2d 855.

> Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases. *See e.g.*, Townsend v. Burke, 1948, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690; Williams v. New York, 1949, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337.

When it has been made to appear that longer sentences have been imposed by the courts because the defendants refused to confess their guilt and persisted in their claims of innocence we have vacated the sentences. United States v. Rodriguez, 5 Cir. 1974, 498 F.2d 302; Bertrand v. United States, 5 Cir. 1972, 467 F.2d 901; *Cf.* United States v. Moore, 5 Cir. 1970, 427 F.2d 38, cert. denied, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384; *Thomas, supra*. Until now we have had no occasion to address ourselves to the situation *sub judice*, where the trial court did not ask Rogers to directly confess his guilt, but rather to "sing" about others involved in the conspiracy. But we view this as a distinction without a difference. In United States v. Acosta, 5 Cir. 1974, 501 F.2d 1330, 1337, the sentencing procedure employed by the district court was reviewed.

> Two sentencing hearings were held. At the first of these, the court gave Acosta to understand that if he would cooperate with the authorities by revealing his drug sources this would redound to his

credit, recessing to permit him to do so. At the second hearing the Court, noting that the "Probation officer doesn't think you have shown any desire to co-operate," passed a heavy, though not a maximum, sentence.

While I can only sympathize with the court's efforts to reach the drug heirarchy [sic] through Acosta, the record suggests the possibility that the court may actually have taken Acosta's refusal to cooperate into account in sentencing. If so, under such authorities as Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) and United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974), the sentence should be vacated and a new sentence imposed without consideration of this refusal.

* * * * * * *

True it is that in both cases the court was urging the convicted defendant to acknowledge only his own guilt, but I am unable to see how Acosta could have implicated others without, at least tacitly, admitting his own complicity.

[Dissenting opinion, Gee, Circuit Judge. This point was not reached or considered by the majority of the panel.]

We think that this result is mandated by Fifth Amendment considerations and we therefore decline to align ourselves with the differing views expressed in United States v. Vermeulen, 2 Cir. 1970, 436 F.2d 72, cert. denied, 1971, 402 U.S. 911, 91 S.Ct. 1390, 28 L.Ed.2d

653; United States v. Chaidez-Castro, 7 Cir. 1970, 430 F.2d 766, and Gollaher v. United States, 9 Cir. 1969, 419 F.2d 520, cert. denied, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424.

The judgment of conviction is affirmed. The sentence is vacated and the case remanded to the district court for further proceedings not inconsistent with this opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Title Omitted)

No. EP-73-CR-783

Filed: Jan. 23, 1974

Prior to the commencement of trial before a jury in the above-entitled and numbered cause, the Defendant filed his Motion to Suppress Evidence, and after the jury verdict was returned, the defendant filed his Motion for Judgment of Acquittal. The Court, after considering all of the relevant facts, the arguments of counsel and the applicable law, makes the following findings of facts and conclusions of law:

On October 7, 1973, at approximately 6:30 a.m., Border Patrol Agent Joe Thompson was driving east in a Border Patrol vehicle without lights on Wingo Reserve Road in El Paso County, Texas. Agent Thompson observed a vehicle without lights traveling in a westerly direction coming toward him and some several hundred yards in front of him. Agent Thompson stopped his vehicle which was marked and had blue and red emergency light on the top of the vehicle. Just a short distance in front of Agent Thompson, the vehicle's lights were turned on and the vehicle began rapid acceleration still traveling in a westerly direction on Wingo Reserve Road. Agent Thompson observed the vehicle in a farming area sparcely populated and some one-quarter of a mile from the international boundary between the United States and Mexico (Govt. Ex. 9).

October 7, 1973 was a Sunday and vehicles of this type would not ordinarily be in the area that early on a Sunday morning. Agent Thompson gave chase to the vehicle which he identified as a pickup truck with a shell camper; and as he was chasing the vehicle, he noticed several large bags in open view in the rear of the pickup. Agent Thompson attempted to stop the vehicle by using his emergency equipment, i.e., red lights and siren. The vehicle attempted to evade Agent Thompson and a high-speed chase followed for some five or six miles. During the course of the chase, Agent Thompson on occasion was going approximately 100 miles per hour. The pickup truck eventually pulled off

the main road between a group of houses located on a farm. The individual driving the pickup truck ran into a cotton field where he was later found by Border Patrol Agent Thompson.

The person driving the pickup truck, the defendant Sterling Keith Rogers, was advised of his Constitutional rights in conformity with *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966). Shortly thereafter, Border Patrolmen notified the Drug Enforcement Administration and subsequently Special Agent Ted Baden of the Drug Enforcement Administration arrived on the scene. As Agent Baden was preparing to leave the scene of the arrest with the defendant in custody, another agent attempted to start the pickup truck which the defendant had been driving. Without prompting of any kind from any of the agents present, the defendant voluntarily stated "If you are trying to start the truck, it won't work. I think I burned the motor out."

Immediately thereafter, Special Agent Baden again advised the defendant of his Constitutional rights which the defendant again acknowledged his understanding. Thereafter, the defendant made certain statements which the government offered as evidence in its case in chief, and which the Court found to be admissible.

The Court concludes that the statements of which the defendant complains, were made voluntarily by him after he had been advised on at least two occasions of his Constitutional rights established by the Supreme Court in *Miranda* v. *Arizona*, supra. The

defendant voluntarily made the statements knowing that he could remain silent and knowing that if he chose to make any statements, the statements could be used as evidence against him. The fact that the defendant voluntarily made certain statements knowing that they could be used against him is buttressed by the fact that at one point during the questioning by the Special Agents, the defendant chose to exercise his right to remain silent and refused to discuss the case further.

In *Miranda* v. *Arizona*, 384 U.S. 436, 457, supra, the Supreme Court noted:

> "... the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures ... The indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantacies ... It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."

The Court likened interrogation methods used in *Miranda* to those used in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

The Court concludes that the facts in this case do not amount to the "compelling atmosphere" of *Miranda* and *Escobedo*.

The Court further concludes that Agent Thompson at the time of the occurrence in question also had

authority to conduct Customs Inspections and searches (Govt. Ex. 14).

> "Custom searches near the border are on a different footing from those conducted in the interior and unrelated to the importation of contraband."

United States v. *Poindexter*, 429 F. 2d 510 (5th Cir. 1970). Customs Agents and those agents acting under Customs authority have not only the statutory authority but also the responsibility to stop and search persons or vehicles on which or whom they suspect there is contraband which has been introduced into the United States Code, Section 482; *Thomas* v. *United States*, 372 F. 2d 252 (5th Cir. 1967); *Valadez* v. *United States*, 358 F. 2d. 721 (5th Cir. 1966); *Willis* v. *United States*, 370 F. 2d 604 (5th Cir. 1966); *Alvarez* v. *United States*, 275 F. 2d 299 (5th Cir. 1960); *United States* v. *Warner*, et al, 441 F. 2d 821 (5th Cir. 1971).

The Court concludes that Agent Thompson's observations of the defendant and his vehicle in the area where he was first observed, more than met the "reasonable suspicion" test required of a Customs Agent to authorize a border search. *United States* v. *Hill*, 430 F. 2d 129, 131 (5th Cir. 1970); *United States* v. *Reagor, et al*, 441 F. 2d 252 (5th Cir. 1971). The facts of this case are not controlled by the recent holding of the Supreme Court in *Almeida-Sanchez* v. *United States*, ___ U.S. ___, 37 L. Ed. 2d 596 (1973).

For the reasons set out above, defendants Motion to Suppress illegally obtained evidence and defendant's Motion for Judgment of Acquittal are in all respects denied.

ENTERED on this the 28th day of January, 1974.

/s/ JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

JUDGMENT AND COMMITMENT

(Number and Title Omitted)

Filed: Jan. 9, 1974

On this 30th day of November, 1973 came the attorney for the government and the defendant appeared in person and by Malcom McGregor and Phil Cole, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a jury verdict of guilty has been convicted of the offense of conspiring to commit offenses against the United States, in violation of 21 USC § 846, that is, he possessed marihuana with intent to distribute same contrary to 21 USC § 841(a)(1), possessing with intent to distribute a quantity of marihuana, a Schedule I Controlled Substance, in violation of 21 USC § 841(a)(1), using a communication facility in facilitating importation of a quantity of marijuana, a Schedule I Controlled Substance, into the United States from Mexico, in violation of 21 USC §843, and conspiring to commit offenses against the United States, in violation of 21 USC § 963, that is, he conspired to import marijuana, a Schedule I Controlled Substance, into the United States from Mexico con-

trary to 21 USC § 952(a) and 960(a)(1) as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Sentence was deferred until January 9, 1974

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS and TWO YEARS special parole on count 1; FIVE YEARS and TWO YEARS special parole on count 2 to run consecutively to count 1; FIVE YEARS and TWO YEARS special parole on count 4 to run consecutively to count 2, and FOUR YEARS imprisonment on count 3 to run concurrently to count 4.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ENTERED on the 9th day of January, 1974.

Approved:

/s/ JOHN H. WOOD, JR.
United States District Judge.

/s/ RONALD EDERER
Assistant U.S. Attorney

In The
United States Court of Appeals
Fifth Circuit

Office of the Clerk

February 21, 1975

TO ALL COUNSEL OF RECORD

Re: 74-1252 U.S.A. v. ROGERS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very Truly Yours,

EDWARD W. WADSWORTH
CLERK

/s/ ANNE G. PARENT
Deputy Clerk

cc: Messrs. Malcolm McGregor
Philip T. Cole
Messrs. Ronald Ederer
William B. Hardie, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1204

STERLING KEITH ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the stop and search of his vehicle by a Border Patrol officer were unreasonable under the Fourth Amendment and that statements made by him after he was given *Miranda* warnings and initially determined to remain silent should have been suppressed.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to possess 427 pounds of marihuana (count 1), possessing marihuana with intent to distribute it (count 2), using a communication facility to import marihuana (count 3), and conspiring to import marihuana (count 4), in violation of 21 U.S.C. 841, 843, 846, and 963. He was acquitted on an importation charge (count 5). Petitioner was sentenced to consecutive terms of five years' imprisonment to be followed by two years of parole on each of counts one, two, and four,

and four years' imprisonment on count three, to run concurrently with the sentence on count four. The court of appeals affirmed the convictions but vacated the sentence and remanded to the district court for resentencing (Pet. App. 1a-13a; 504 F. 2d 1079).

The evidence showed that in the early morning hours on Sunday, October 7, 1973, Border Patrol Agent Thompson, driving a marked vehicle, was patrolling a sparsely settled area on a gravel road parallel to and about a quarter mile from the Rio Grande River in Texas (Tr. 8-9, 32-33). The river is normally dry at the point where Thompson was patrolling, and it was a known crossing point for illegal aliens (Tr. 32, 45).

At about 6:30 a.m., prior to sunrise, Agent Thompson observed a pickup truck with a camper on the back approaching him from the direction of the river with its headlights out (Tr. 9-12). His suspicions aroused, the officer pulled over and parked the patrol car on the right side of the road to observe the approaching vehicle (Tr. 9-10). When the driver of the truck was close enough to realize that the parked car was a patrol vehicle, he switched on the truck's headlights and speeded up (Tr. 11).

After the truck passed him, the officer made a U-turn and began to follow it. The truck was by then traveling "at a very high rate of speed" and appeared to the officer to be "trying to get away from me or trying to get out of the area" (Tr. 12). Agent Thompson activated his siren and red lights and pursued the truck at speeds reaching 100 miles per hour (Tr. 12-13, 16-17). The truck left the road, drove through several cotton fields, crashed through a barbed-wire fence, and entered another road (Tr. 13-14). While the truck was passing through the fields, its contents bounced up in

the back of the pickup, and the officer was close enough to see several clear, large plastic sacks that appeared to contain marihuana (Tr. 14-15).

Agent Thompson attempted to draw alongside the truck, but the driver several times swerved toward the center of the road preventing the officer from passing (Tr. 15-16). Agent Thompson then discharged his firearm in the air (Tr. 17). The truck left the road again, entered a field on a farm, and, after a second warning shot, came to a halt between two shacks on the farm (*ibid.*). The driver ran from the truck, and Agent Thompson pursued him on foot (*ibid.*). As the officer passed the truck, he again saw the plastic sacks and detected a strong odor of marihuana (*ibid.*). The officer later found petitioner lying face down between two rows of cotton (Tr. 18).

Agent Thompson arrested petitioner and immediately gave him *Miranda* warnings (Tr. 19). After the two men had walked back to the patrol vehicle, Thompson again read petitioner *Miranda* warnings from a card and searched his person (Tr. 19-20). Petitioner indicated that he understood his rights and that he did not wish to waive them (Tr. 20). A search of the truck revealed 427 pounds of marihuana, a walkie-talkie, a battery pack, an extra antenna, and a police scanner (Tr. 19-20, 26-27).

Special agents of the Drug Enforcement Administration arrived at the scene and took custody of petitioner and his vehicle. As one of the agents attempted to start the truck, petitioner spontaneously stated to another agent, "If he's trying to start that vehicle, it will not run. I think I burned the engine out of it" (Tr. 55). Agent Baden then drove petitioner to the DEA office at the Bridge of the Americas port of entry. Baden, who was

aware that Thompson had advised petitioner of his rights but not that petitioner had declined to waive them (Tr. 70), once again gave petitioner *Miranda* warnings, and petitioner stated that he understood them (Tr. 57-58, 65-66). The two men then engaged in a conversation during the 30 to 45 minute ride (Tr. 58, 61). Baden testified: "We were carrying on a conversation. There was a certain rapport that had just developed. * * * He was trying to sell me his jack-knife, his boots and things like this and it was just conversation" (Tr. 63).

In the course of the conversation, Baden asked petitioner where the other walkie-talkie was, and petitioner stated, "They were in the area but they must have gotten paranoid and split" (Tr. 58, 67). Petitioner stated, "not in response to a question, that he had driven his vehicle * * * down to the [river levee] and that some Mexicans that he did not know had loaded it" (Tr. 59, 67). Petitioner also acknowledged that he had purchased the radio equipment (Tr. 58, 66).

Petitioner was again advised of his rights at the DEA office (Tr. 77-78). DEA Special Agent Compton asked him whether the 427 pounds of marihuana was the amount he was supposed to have received. He responded that "he wasnt [*sic*] supposed to have gotten any marijuana, he said he was stupid for picking it up, that he wasn't supposed to pick it up, but that he did" (Tr. 78).

1. Petitioner contends (Pet. 9-21) that the stop and search of his vehicle violated the Fourth Amendment's proscription against unreasonable searches and seizures. Although we have argued in *United States* v. *Brignoni-Ponce*, No. 74-114, that a Border Patrol officer may lawfully stop a vehicle in the Mexican border area without any particularized suspicion focused upon the vehicle to be stopped, there is no need to hold this case pending the decision in *Brignoni-Ponce*.

As the facts stated above clearly show, the officer here had a particularized founded suspicion focused on petitioner's vehicle that justified his initial effort to make an investigative stop. The truck was in a sparsely populated area about 300 yards from the Mexican border, near a river crossing point commonly used by illegal aliens; it was driving without headlights at a time when the officer would have expected headlights to be used; and the driver switched on the headlights and quickly accelerated when he saw the Border Patrol vehicle. These articulable facts were sufficiently suspicious to warrant a stop for the purpose of investigation. Petitioner's actions after the officer began to follow the truck, and the officer's observation that the truck appeared to contain packages of marihuana, plainly gave him probable cause to believe that a crime was being committed and justified the arrest and subsequent search of the truck.

Thus, while we agree with the court of appeals that "these circumstances create a nexus with the border that is sufficient to make this a border search" (Pet. App. 4a), the existence of particularized probable cause makes it unnecessary to rely on a border search rationale. The officer's actions were lawful under traditional doctrines of founded suspicion and probable cause.

2. Petitioner also argues (Pet. 21-26) that, because he initially indicated that he would not waive his *Miranda* rights, the officers acted improperly in engaging him in the conversation in which he made incriminating remarks. In petitioner's view, the question is whether "a defendant [may] impliedly rescind an articulated refusal to waive Fifth Amendment rights simply by responding to interrogation after repeated warnings of

his right to remain silent" (Pet. 23). A similar issue is before this Court in *Michigan* v. *Mosley*, No. 74-653.

The facts of this case, however, do not present the question posed by the petition, and there is no need to defer disposition of the petition pending the decision in *Mosley*. As our statement of the facts indicates, petitioner spontaneously stated, after two sets of warnings, that he had burned out the engine of his truck. After a third warning, he freely engaged in casual conversation with Agent Baden, stating, not in response to any question by Baden, that he had driven the truck to the river, where other persons had loaded it with marihuana. After yet a fourth warning, petitioner voluntarily stated that he had picked up the marihuana and was stupid to have done so.

This is not a case in which the officers repeatedly sought a waiver of rights or renewed their interrogation after failing to secure such a waiver. It is a case in which the accused himself initiated conversation after an initial refusal to waive his rights and, after further warnings, freely answered questions and volunteered information. The record here fully supports the ruling of the court of appeals that petitioner was effectively advised of his rights and that he intelligently and understandingly declined to exercise them (Pet. App. 6a-7a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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